86 - 1343

No. .....

Supreme Court, U.S.
FILED
FEB 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, A.D. 1986

—o—

ROBERT JAMES TAFOYA,

Petitioner,

v.

NEW MEXICO,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

—o—

JOHN L. WALKER
Attorney at Law, P.C.
601 Tijeras N.W.
Albuquerque, NM 87102
(505) 243-2553

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the introduction of testimony of child witnesses on videotape violated the Confrontation Clause of the Sixth Amendment of the United States Constitution when the accused was not present and seated with his counsel and thus face to face with the witnesses while testifying.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
OPINIONS BELOW	2
STATEMENT OF JURISDICTIONAL GROUNDS	2
CONSTITUTIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	5
(1) Facts Material to Question Presented	5
(2) Presentation of the Federal Question Below	7
BASIS FOR GRANTING THE WRIT OF CERTIORARI	7
ARGUMENT FOR ALLOWANCE OF THE WRIT	8
Introduction	8
(1) Historical Foundation for Face-to-Face Requirement	10
(2) Contemporary Treatment of Face-to-Face Requirement	12
(3) Why the Opinion of the Court of Appeals of New Mexico Conflicts Directly With This Court's Interpretation of the Sixth Amendment.	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970) 10, 15

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974) 10, 13

Douglas v. Alabama, 380 U.S. 415, 100 S.Ct. 2537 (1965) 14

Dowdell v. United, 221 U.S. 325, 31 S.Ct. 590 (1911) 12, 13, 14

Herbert v. Superior Court, 172 Cal.Rptr. 850, 19 ALR 4th 1276 (1981) 9, 14

Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970) 17

Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574 (1899) 11, 13

Long v. State, 694 S.W.2d 185 (Tex. App. 1985) 14

Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337 (1895) 9, 11, 13, 14

McGuire v. State, 706 S.W.2d 360 (Ark. 1986) 14

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980) 14, 15

State v. Vigil, 711 P.2d 28 (N.M. App. 1985) 9

Stincer v. Commonwealth, 712 S.W.2d 939 (Ky. 1986) 7

United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) 7, 9, 12

United States v. Feldman, 761 F.2d 380 (7th Cir. 1985) 13

TABLE OF AUTHORITIES—Continued

Page

STATUTES

N.M. Stat. Ann., Sec. 30-9-17 ..... 2, 3, 9, 14

28 USC Section 1257(3) 2

TEXTS

Annot., *Conditions Interfering With Accused's View of Witness as Violation of Right of Confrontation,* 19 ALR 4th 1286 (1983) 8

Note, *Criminal Defendant has Sixth Amendment Right to Physically Confront Witness at Videotape Deposition,* 4 Wash. U.L.Q. 1106 (1979) 8

4 J. Weinstein and M. Berger, Weinstein's Evidence, Sec. 800 [01], (1979) 15

CONSTITUTION

United States Constitution, Sixth Amendment ..... *passim*

RULES

Rule 15, F.R.Crim.P. 12

Rule 29, N.M.R.Crim.P. 5

Rule 29.1, N.M.R.Crim.P. 4, 5, 6

Rule 801(d)(1)(B) 16

No. .....

—o—

In The

Supreme Court of the United States

October Term, A.D. 1986

—o—

ROBERT JAMES TAFOYA,

Petitioner,

v.

NEW MEXICO,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

—o—

The Petitioner, Robert James Tafoya, hereby moves the Supreme Court to issue its Writ of Certiorari to the Court of Appeals of New Mexico to review the decision of that Court affirming his convictions following a jury trial of twenty three counts of various felony offenses (aggravated burglary, kidnapping, criminal sexual penetration and criminal sexual contact), and as grounds therefor, states the following:

OPINIONS BELOW

Petitioner was convicted at trial, and appealed directly to the Court of Appeals of New Mexico. The opinion of that Court is printed in the Appendix to this Petition and likewise appears at 729 P.2d — (N.M. App. 1986).

—o—

STATEMENT OF JURISDICTIONAL GROUNDS

The Court of Appeals of New Mexico affirmed Petitioner's conviction in an opinion filed on October 7, 1986. A timely motion for rehearing, filed on October 20, 1986, was denied. The Supreme Court of New Mexico declined to review the opinion, and the decision of the Court of Appeals was made final by its order of December 18, 1986.

The jurisdiction of this Court is invoked pursuant to 28 USC Section 1257 (3). This petition will be timely filed if presented on or before February 16, 1987, 60 days from the issuance of the Order of the Court of Appeals of New Mexico making its decision final.

—o—

CONSTITUTIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment Six (Confrontation Clause).

N.M. Stat. Ann., Sec. 30-9-17:

30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act.

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

Rule 29.1, N.M.R.Crim.P.:

Rule 29.1 Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

(a) Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

(b) At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, any part or all of the videotaped deposition of a child under thirteen years of age taken pursuant to Paragraph (a) of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

(c) In addition to the use of a videotaped deposition as permitted by Paragraph (b) of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph (n) of Rule 29. [Adopted, effective July 1, 1980.]

———o———

STATEMENT OF THE CASE

(1) Facts Material to Question Presented

By written motion prior to trial, pursuant to Rule 29.1, N.M.R.Crim.P., the State successfully moved for the taking of the depositions of several child witnesses in lieu of their in-person live testimony in front of the jury at trial in the cause. Defendant objected in writing on federal constitutional grounds (Sixth Amendment Confrontation Clause). The State's Motion, which was ultimately granted by the trial court for five depositions, asked that the Defendant be placed in a separate room from which he could view the proceedings, but where the witness could not see or physically confront him. The written motion recited that psychological harm would result if proceedings were held in *open court*, with specifics as to each child. However, nothing but a mere allegation of future harm was made for the face-to-face confrontation matter. Testimony adduced by the State made a showing of trauma and harm for a traditional open courtroom setting, but

merely showed that the witnesses would be "very nervous" in telling their story in front of Petitioner and that this would be "too upsetting".

At one of several hearings held on the videotape motion, both the guardians for the children and counsel for the State pressed for no physical confrontation to be allowed, and that the "confrontation" allowed by the Sixth Amendment be through his trial counsel. Trial counsel objected to the manner of proceeding where the defendant was kept in a control booth unseen by anyone, especially the witnesses while testifying. Counsel for the State argued, on the basis of psychological testimony of nervousness, that all of the witnesses would be impaired in the giving of their testimony by the physical presence of the accused in the same room while testifying and that Rule 29.1, N.M.R.Crim.P., implicitly allowed her requested procedure. The trial court ultimately ruled in favor of the State's position when the actual depositions were taken and ordered Petitioner placed in a video booth where he could view (and hear) the proceedings on a T.V. monitor but could not be seen by the child witnesses. Trial counsel faced the witnesses alone, although he had a headset which he would put on at the end of each witness' testimony to talk to his client.

Trial counsel thoroughly cross-examined for memory and credibility all witnesses appearing on videotape, especially the two who identified Petitioner at a lineup held after arrest in this case. The videotapes of the child witnesses were played on a T.V. monitor before the jury at trial in lieu of live testimony. The videotapes showed trial counsel conducting cross-examination and, during direct examination, sitting at counsel table alone; Petitioner was not seen in the videotapes at any time.

(2) Presentation of the federal question below

Petitioner objected in the trial court (both verbally and in writing) to the procedure adopted for the taking of videotaped depositions in this case. Trial counsel insisted that the only constitutional method of substituting in-court testimony by deposition for the actual presence of the witness was in the face-to-face "confrontation" literally guaranteed by the Confrontation Clause. This position was overruled by the trial court.

On appeal, Petitioner squarely presented this claim as his lead issue in all briefs and in his Motion for Rehearing. The opinion of the Court of Appeals, upon which review is sought here, rejected his claims of Sixth Amendment violation.

BASIS FOR GRANTING THE WRIT OF CERTIORARI

The opinion of the Court of Appeals of New Mexico conflicts with the leading decision of the United States Court of Appeals for the Eighth Circuit in *United States v. Benfield,* 593 F. 2d 815 (8th Cir. 19~9) and the decision of the Kentucky Supreme Court in *Stincer v. Commonwealth,* 712 S.W.2d 939 (Ky. 1986). Certiorari has been granted in *Kentucky v. Stincer,* No. 86-572, on December 8, 1986.

There exists a significant question of law under the Sixth Amendment of the United States Constitution (Confrontation Clause) in that the Court of Appeals of New Mexico decision in this case appears to be the first—and only—appellate opinion in the United States holding that it is permissible to abridge the Defendant's constitutional

right to face-to-face view of the witnesses who testify against him at trial in a situation where he has caused no disruption or engaged in threatening behavior and where the witness is otherwise available to testify. Furthermore, the opinion of the Court misconstrues several decisions of this Court which are historically applicable authority, and its opinion injects several irrelevant considerations dealt with in the Argument section of this Petition.

———o———

ARGUMENT FOR ALLOWANCE OF THE WRIT

Introduction

In this direct appeal, Petitioner has challenged the physical arrangement of the videotaped deposition as violating the face-to-face requirement of the Confrontation Clause of the Sixth Amendment of the United States Constitution.

The videotape depositions taken here were constitutionally defective in that the physical arrangement ordered by the trial court placed the Petitioner in a separate video booth out of the physical presence of the witness (but where he could view proceedings himself).

Television technology has advanced to a level not contemplated by the Framers of the Constitution; however, arrangements of the type used in this case have generally been disapproved. Annot., *Conditions Interfering With Accused's View of Witness as Violation of Right of Confrontation*, 19 ALR 4th 1286 (1983); Note, *Criminal Defendant has Sixth Amendment Right to Physically Con-*

front Witness at Videotape Deposition, 4 Wash. U.L.Q. 1106 (1979).

Major recent decisions dealing with this question have rejected videotape arrangements where the accused is not allowed to directly "confront" the witness face to face in his presence. *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979); *Herbert v. Superior Court*, 172 Cal. Rptr. 850, 19 ALR 4th 1276 (1981). In 1985, New Mexico upheld the constitutionality of N.M.Stat.Ann. Sec. 30-9-17 allowing the trial court to substitute a videotape deposition in lieu of live in-court testimony for children under age 13. *State v. Vigil*, 711 P. 2d 28 (N.M. App. 1985).

According to the *Vigil* opinion the touchstone for analysis is "... that the confrontation right must be interpreted in light of the law as it existed at the time the amendment was adopted." *Vigil*, supra, 711 P.2d at 31, citing *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337 (1895). In its ruling in the case before the Court, the opinion of the Court of Appeals of New Mexico cites *Vigil*, supra, and states:

> This case requires us to answer the question of whether the absence of actual face-to-face confrontation can be justified under the rationale of *Vigil*. We hold that it can.
>
> App. at 4.

The opinion paid only lipservice to *Benfield*, supra, and *Herbert*, supra. These decisions squarely hold that face-to-face observation by witness and accused is part of the Confrontation Clause of the Sixth Amendment.

(1) Historical Foundation for Face-to-Face Requirement

Several decisions of this Court from the turn of the century bear directly on the question presented in this case, namely, the extent to which physical face-to-face confrontation is required where a witness testifies either in open court or by videotape deposition. This framing of the question presented serves to eliminate confusion surrounding cases involving "hearsay" statements and any confrontation violations resulting therefrom.

Physical face-to-face meeting while testifying is directly mandated by the Sixth Amendment and such a principle is taken as required by most Supreme Court opinions. *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 1109 (1974) ("Confrontation means more than being allowed to confront the witness *physically.*") (emphasis supplied). Elimination of depositions or *ex parte* affidavits was, to be sure, a goal of the Confrontation Clause, but not the sole interest protected by it, as evidenced by the historical discussion in *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930 (1970):

> But objections occasioned by this practice appear primarily to have been aimed at the failure to call the witness to confront personally the defendant at his trial. So far as appears, in claiming confrontation rights no objection was made against receiving a witness' out-of-court depositions or statements, so long as the witness was present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact.
>
> Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause . . . (citing *Mattox,* 156 U.S. at 242-243.)
>
> 399 U.S. at 157, 90 S.Ct. at 1934.

The concurring opinion of Justice Harlan posited two opposing theoretical approaches to confrontation, one being a restrictive approach that " . . . the clause may be read to confer nothing more than a right to meet face to face . . ." all witnesses against an accused. 399 U.S. at 175, 90 S.Ct. at 1944. See also opinion of Brennan, J. (dissenting), 399 U.S. at 193 (witness "stands *face to face with the accused* and the fact finder") (emphasis supplied).

In *Mattox*, supra, the Supreme Court upheld the use of previously sworn testimony of a deceased witness from the accused's prior trial on the same charge. The rationale for so holding was that both physical confrontation *and* cross-examination had been fully complied with during the first trial:

> *The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face* and of subjecting him to the ordeal of a cross-examination. *This, the law says, he shall under no circumstances be deprived of,* and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven.
>
> 156 U.S. at 244, 15 S.Ct. at 340. (emphasis supplied)

In *Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574 (1899), the Court reversed a conviction on Confrontation Clause grounds where evidence from a *separate* trial of a codefendant was introduced in the accused's trial. Justice Harlan stated as his reasoning:

> But a fact which can be primarily established only by witnesses cannot be proved against an accused, charged with a different offense, for which he may be convicted without reference to the principal offender,

> *except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine,* and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.
>
> 174 U.S. at 55, 19 S.Ct. at 577 (emphasis supplied).

See also *Dowdell v. United States,* 221 U.S. 325, 330, 31 S.Ct. 590, 592 (1911) (Philippine Bill of Rights Provision allowing accused "to meet the witnesses face to face" substantially same as 6th Amendment provision, and "intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him . . .").

(2) Contemporary Treatment of Face-to-Face Requirement

Contemporary cases have kept faith with these principles. The United States Court of Appeals for the Eighth Circuit held unconstitutional a videotape procedure similar to the one used here. *United States v. Benfield,* 593 F.2d 815 (8th Cir. 1979). A videotape deposition of a kidnap victim was authorized by the trial court pursuant to Rule 15, F.R.Crim.P., and the court ordered that Benfield could not be "within the vision" of the witness; in addition, the witness was deceived as to the presence of the defendant in the building and his ability to hear and view the testimony as it was being given. *Id.* at 820-21. These facts parallel those in the case before this Court, although most of the witnesses appear to have been told that the Petitioner was viewing them on a T.V. monitor in another room.

The *Benfield* court reviewed some of the same historical development of the Sixth Amendment as referred to above and concluded:

> After carefully considering the sixth amendment, applicable to case law, and this record, we are satisfied that the rights of Benfield were abridged by the above procedure. Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. *Mattox, Kirby, Dowdell,* and *Snyder,* which were discussed above, all support that view. While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). *The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel. While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgement of the defendant's rights.* A video-taped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally inform. *Id.* at 821 (emphasis supplied).

Accord., *United States v. Feldman,* 761 F.2d 380 (7th Cir. 1985) (Civil deposition inadmissible in criminal trial as violating Confrontation Clause where Defendant not present when it was taken.)

State courts reaching the merits of the face-to-face requirement have generally found it to be violated when the witness and accused are not physically in each other's

view while testifying. *Herbert,* supra (historical right to face accuser is violated by seating arrangement when witness was not required to view accused); *Long v. State,* 694 S.W.2d 185 (Tex. App. 1985) (statute preventing attendance of accused at videotape deposition violated "face-to-face confrontation" requirement); *McGuire v. State,* 706 S.W.2d 360 (Ark. 1986) (statute virtually identical to New Mexico Sec. 30-9-17 upheld as not violating confrontation because "our statute requires face-to-face confrontation between the victim, the defendant and his attorney at the time the deposition is taken . . .").

(3) Why the Opinion of the Court of Appeals of New Mexico Conflicts Directly With This Court's Interpretation of the Sixth Amendment.

The opinion of the Court of Appeals fails to adequately analyze and uphold the historical principles of face-to-face confrontation as part of the Sixth Amendment guarantees. In ignoring the historical context of *Mattox v. United States,* 156 U.S. 237 (1895) and *Dowdell v. United States,* 221 U.S. 325 (1911), the opinion makes the point that the Confrontation Clause is not "absolute" because, if so, the admission of dying declarations would be clearly prohibited by the Clause. The opinion then cites *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531 (1980). The opinion of this Court stated, 448 U.S. at 164, 100 S.Ct. at 2537:

> The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross examination." *Douglas v. Alabama,* 380 U.S. 415, 418 (1965), 100 S.Ct. at 2537.

Footnotes 5 and 6, both of which are linked to the above quotation, are illustrative of the intellectual underpinnings of the face-to-face confrontation requirement. Footnote 5 cites *California v. Green,* 399 U.S. 149, 157, 90 S.Ct. 1930, 1934 (1970) for the proposition that "it is this literal right to confront the witnesses at the time of the trial that forms the core of the values furthered by the Confrontation Clause." Footnote 6 cites *Green,* supra, and states:

> Confrontation at trial also operates to ensure reliability in other ways. First, "the requirement of personal presence . . . undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial." 4 J. Weinstein and M. Berger, Weinstein's Evidence, Sec. 800 [01], pp. 800-10 (1979).

Furthermore, the opinion of the Court of Appeals, App. at 5, purports to create "a specific species of unavailability" for child witnesses who might suffer mental or emotional harm as a result of testifying. *Roberts,* supra, makes it clear that unavailability is a requirement for utilization of out-of-court statements. But there is nothing in *Roberts* to indicate that this unavailability can arbitrarily suspend the requirement of face-to-face confrontation between the Defendant and the witness while testifying.

Contrary to the assertion of the opinion of the Court of Appeals, App. at 6, that "the primary reason for seeking the videotaped depositions was" the problem with the face-to-face confrontation with the Defendant when testifying, the main reason articulated by the State in its written request for depositions was that the witnesses

did not wish to appear at an open courtroom proceeding (Record Proper, 26-27). Furthermore, the opinion misconstrues the record of testimony at the motions hearing from various psychological witnesses; the main focus of the testimony was the necessity for videotape deposition to supplant the trial setting. Only incidental mention was made that it would likewise be inappropriate for the witnesses to face the defendant when testifying at the deposition, and no specific trauma or harm was linked to facing the accused at trial. Nonetheless, this attempt to justify the procedure used here fails when compared to the historical justification for the Confrontation Clause itself.

Finally, the opinion of the Court of Appeals, App. at 7, questions "the need for face-to-face confrontation in this case." There are two answers to this argument; first, such a standard is worthless for future cases since one can never know in advance when face-to-face confrontation would be "needed"; second, face-to-face confrontation was in fact "needed" to buttress the verbal cross-examination by trial counsel. As the opinion of the court pointed out in answer to another contention, App. at 9, trial counsel for Petitioner cross-examined witnesses for general credibility and for improper motive or undue influence. Trial counsel also cross-examined as to "confusion" which the opinion found was close enough to "fabrication" to allow the introduction of a second videotape under Rule 801(d)(1)(B). Furthermore, as the opinion points out, App. at 7, two of the witnesses identified the accused in a lineup and so testified at the videotape deposition. They were subject to cross-examination by trial counsel as to their recollection and the possibility of undue influence by police agencies. The truthfulness of their responses on these issues was clearly at issue and would

be enhanced by "the moral suasion of facing the accused" (*Id.*)

There was no justifiable reason to dispense with the face-to-face requirement of confrontation between witness and accused. There is no evidence here that the witnesses were frightened because they believed he was going to attack them if he were in the same room, and there is no evidence of disruption by the Defendant. See *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057 (1970).

———o———

CONCLUSION

Petitioner hereby respectfully requests this Court to grant his Petition for Writ of Certiorari, to join this cause with *Kentucky v. Stincer,* No. 86-572, and to reverse the final judgment of the Court of Appeals of New Mexico entered on December 18, 1986.

Respectfully submitted,

JOHN L. WALKER
Attorney at Law, P.C.
601 Tijeras N.W.
Ste. 200
Albuquerque, NM 87102
(505) 243-2553

Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs. No. 9004

ROBERT JAMES TAFOYA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

JOSEPH F. BACA, Judge

(Filed October 7, 1986)

PAUL G. BARDACKE, Attorney General
CHARLES H. RENNICK, Assistant Attorney General
Santa Fe, New Mexico, Attorneys for Plaintiff-Appellee

JOHN L. WALKER
Albuquerque, New Mexico
Attorney for Defendant-Appellant

OPINION

GARCIA, Judge.

The convictions in this case arose out of a series of violent incidents in Albuquerque's Northeast Heights area in the fall of 1984. The jury found that defendant broke into the homes of six young girls and one adult woman in the middle of the night, woke them and committed sexual offenses on them. Victims two, five and seven identified defendant at a line-up. Defendant's fingerprints were found at the crime scenes of all victims but victim four. Serology evidence consistent with defendant's char-

acteristics was present in the cases of victims one and four. Defendant's defense was an alibi; he and family members testified that he was home, asleep, on the nights of all of the offenses.

Convicted of various counts of aggravated burglary, kidnapping, criminal sexual penetration with a deadly weapon, criminal sexual penetration of a minor, criminal sexual contact with a minor and aggravated battery, defendant appeals.

Defendant raises seven issues on appeal: (1) a claim of error in allowing five of the child victims to give videotaped testimony under circumstances in which defendant was made to sit in a control booth, thus denying him face-to-face confrontation with these victims; (2) a claim of error in allowing a prior consistent statement of one of the victims into evidence; (3) several claims of error in refusing to excuse certain jurors for cause; (4) a claim of error in the court's failure to strike expert testimony on fingerprints; (5) a claim of error that the line-up identification was unnecessarily suggestive; (6) a claim of error that the evidence was insufficient to support defendant's convictions as they relate to victim four; and (7) a claim of error that the sentence is illegal. Other issues, listed in the docketing statement but not briefed, are abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). We find no error and affirm the convictions and sentences.

1. Face-to-face confrontation

Defendant contends that the court's allowance of a videotaped deposition procedure that required defendant

to remain in a control booth during the taking of the testimony violated his right to confront the witnesses against him, contrary to U.S. Const. amend. VI. He also contends that the procedure violated the statute and rule permitting videotaped depositions, NMSA 1978, Section 30-9-17 (Repl. 1984) and NMSA 1978, Crim.P.R. 29.1 (Repl.Pamp.1985).

The statute and the rule require the deposition to be taken "in the presence of defendant" or require defendant to be "present." In relevant part the statute provides: "The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys."

The statute and rule were enacted pursuant to the strong public policy of sparing child victims of sexual crimes the further trauma of in-court testimony. *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct.App.1985). Webster's Third New International Dictionary, p. 1793 (1971), defines "present" or "presence" as "being in one place and not elsewhere," "within reach," and "at hand." According to these definitions, defendant was present at the taking of the videotaped depositions. He was in a control booth and could view all of the proceedings. His attorney had a headset and microphone so that he could be in constant contact with defendant. Defendant was at hand and within reach. While he was not within the sight of the witnesses, in light of our strong public policy, we believe the requirement of presence intended by the legislature and our supreme court was satisfied. *Cf. State v. Lujan*, 103 N.M. 667, 712 P.2d 13 (Ct.App.1985).

We now turn to whether the procedure used in this case satisfied defendant's constitutional rights. We have

already held in *Vigil* that upon a proper showing of unreasonable and unnecessary mental or emotional harm to the victim, a videotaped deposition, taken prior to trial and then shown to the jury, where the deposition is presided over by the court and where defendant has the opportunity to cross-examine the victim, does not violate the right of confrontation. The issue of face-to-face confrontation was not raised in *Vigil*. This case requires us to answer the question of whether the absence of actual face-to-face confrontation can be justified under the rationale of *Vigil*. We hold that it can.

Defendant urges us to follow the cases of *United States v. Benfield*, 593 F.2d 815 (8th Cir.1979), and *Herbert v. Superior Court*, 117 Cal.App.3d 661, 172 Cal.Rptr. 850 (1981). *See generally* Annot., 19 A.L.R.4th 1286 (1983). In their requirement of face-to-face confrontation, these cases were concerned with the intangible effect that requiring the witness to testify in the face of his accuser has on the truth-seeking process:

> Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge.
>
> . . . .
>
> The historical concept of the right of confrontation has included the right to see one's accusers face-to-face, thereby giving the fact-finder the opportunity of weighing the demeanor of the accused [sic] when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness' reluctance to face the accused may be the product of fabrication rather than fear or embarrassment.

Herbert, 117 Cal.App.3d at 670, 671, 172 Cal.Rptr. at 855.

Defendant also relies on United States Supreme Court cases such as *Mattox v. United States,* 156 U.S. 237 (1895), and *Dowdell v. United States,* 221 U.S. 325 (1911). These cases contain language indicating that face-to-face confrontation is part of the sixth amendment. However, these cases also make clear that the general rule favoring confrontation sometimes must give way to considerations of policy and necessity. Thus, for example, dying declarations have always been an exception to the general rule regarding confrontation, lest the courts be put in the untenable position of saying that criminals should go free because their victims die. *Mattox. See also Ohio v. Roberts,* 448 U.S. 56 (1980). In cases of necessity, such as where the witness is unavailable, *State v. Martinez,* 99 N.M. 48, 653 P.2d 879 (Ct.App.1982), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982), or where a child witness would suffer unreasonable and unnecessary mental or emotional harm, a specific species of unavailability, *see Vigil,* and where the out-of-court statements bear adequate indicia of reliability, the sixth amendment does not preclude their admission.

The state, on the other hand, urges us to follow Wigmore's approach, 5 Wigmore, *Evidence* §§ 1365, 1395 (Chadbourne rev.1974); *see also State ex rel. Human Services Dept. v. Gomez,* 99 N.M. 261, 657 P.2d 117 (1982), and hold that demeanor and other such intangibles form no part of the right of confrontation. Rather, they are simply incidental benefits of cross-examination, the major benefit of the right of confrontation. Indeed, Wigmore has gone so far as to say that cases requiring a face-to-

face meeting between the accused and the accuser are "amusing legal pedantry," whose reasoning is "absurd." 5 Wigmore, *Evidence,* § 1399, n.1 (Chadbourne rev.1974).

We accept neither extreme position, but consider the rights of defendant together with those of the victims in light of the particular facts of this case. The cases on which defendant relies are not necessarily to the contrary. In neither *Herbert* nor *Benfield* was there a strong showing of necessity for dispensing with the requirement of face-to-face confrontation before the fact-finder. By contrast, the testimony in this case was abundant that each child subject to the videotape procedure would suffer unreasonable and unnecessary mental or emotional harm from testifying face-to-face with defendant.

The primary reason for seeking the videotaped depositions in this case was that the child victims did not want to see defendant and did not want defendant seeing them. The child victims ranged in age from four to eleven. All were suffering ill effects from the trauma of the crimes. A nine year old was refusing to sleep in her own room. She insisted on sleeping with two sets of undergarments and two sets of nightclothes on, in a sleeping bag on the floor of the family room in which her grandfather was staying. A four year old would not walk from room to room alone in her own house. An eleven year old regressed to insisting on sleeping with a nightlight on and with a teddy bear.

The expert testimony was that all the children were abnormally anxious and expressed their anxiety in particular when talking about the prospect of testifying in

court in front of defendant. If required to testify in court in front of defendant, each child would have to undergo therapeutic intervention to repair the damage brought by simply testifying in that setting. Each professional who saw these children testified that the children would suffer unreasonable and unnecessary mental or emotional harm from having to testify in front of defendant. Some testified that the children ran the risk of becoming incoherent or "freezing" were they to see defendant. Both the statute and the court rule seek to protect victims from this kind of harm.

In addition, we question the need for face-to-face confrontation in this case. This is not a case in which the defense is that the child is fabricating the events and in which the moral suasion of facing the accused might influence the child to tell the truth. *Cf. Herbert.* In this case, a complete stranger invaded the bedrooms, sleep, and bodies of young victims. Only two of them were able to identify defendant in a line-up. They were not frightened of telling the truth in front of a known defendant. Rather, they were frightened at the prospect of being in the same room with the person believed to be their attacker.

Because the utility of face-to-face confrontation as an aid to eliciting the truth was remote, *cf. State v. Owens,* 103 N.M. 121, 703 P.2d 898 (Ct.App.1984); *cert. quashed,* — N.W. —, — P.2d — (1985); *see also State v. Taylor,* 103 N.M. 189, 704 P.2d 443 (Ct.App.1985), because there was a sufficient showing that these children were unavailable to confront defendant face-to-face, *see Vigil,* and because the videotape procedure provided defendant with a full opportunity to cross-examine the victims, *Vigil,* we

hold that his confrontation rights were not abrogated by the procedure. *See Ohio v. Roberts.*

2. Prior statement

Victim six was four years old. She was awakened by a man in her bedroom, carried into the family room, forced to perform fellatio, and put back to sleep. At first, she thought the man was her father because he was the only adult male she knew. Later, she came to understand that the "bad man" was not her father.

Victim six gave a videotaped statement to the police four days after the incident. During her videotaped deposition, taken as a substitute for trial testimony, she was cross-examined about her initial impression that it was her father who took her out of her room. She was further cross-examined about the number of times she had gone over her story with her mother or others. Included in the cross-examination was reference to the prior videotaped statement. During the redirect examination, the state moved for admission of the prior statement, pointing out that, while the state did not wish it to be played during the deposition, it would want it played for the jury after the videotaped deposition was played at trial. Defense counsel pointed out that he was not present during the police statement and asked the court to review the statement before making a decision on the matter. The court took the matter under advisement and the videotaped deposition was concluded. At trial, defendant objected to the introduction of the police statement and he contends, on appeal, that the statement was inadmissible under the rules of evidence and denied him his right of confrontation.

NMSA 1978, Evid. Rule 801(d)(1)(B) (Repl.Pamp. 1983) allows the introduction of prior consistent statements if they are offered to rebut an expressed or implied charge of recent fabrication or improper influence or motive. Defendant contends that, while he cross-examined victim six as to her general credibility and as to confusion regarding who her attacker was, he did not charge recent fabrication or improper influence. We disagree. An attack on general credibility satisfies the recent fabrication element. *State v. Vigil.* Moreover, the cross-examination concerning the victim's change in story and the number of times she discussed her testimony with her mother and others amounts to a charge of improper influence.

Nor were defendant's confrontation rights violated by the procedure. Defendant argues the issue as though he had no inkling that the police statement would be introduced until the trial, at which time he had no opportunity to cross-examine the victim on her statement. This argument ignores the procedure in the trial court, in which the statement was first introduced at the deposition, which defendant knew was being taken as a substitute for trial testimony and at which time he could have cross-examined the victim. Actual cross-examination is not the test for whether confrontation rights are satisfied; it is the *opportunity* for cross-examination which is the key. *State v. Massengill*, 99 N.M. 283, 657 P.2d 139 (Ct.App.1983). Under the circumstances, the trial court did not err in admitting the prior consistent statement.

3. Jury Issues

Defendant contends that he was denied his right to a trial by a fair and impartial jury. His brief details sev-

eral compliants. We need not repeat them here. With regard to some of the complaints, defendant declined the court's offer of cure and, therefore, cannot now be heard to claim reversible error. *Cf. State v. Vialpando,* 93 N.M. 289, 599 P.2d 1086 (Ct.App.1979), *cert. denied,* 93 N.M. 172, 598 P.2d 215 (1979). With regard to others, defendant informed the trial court that he was satisfied with the particular jurors and cannot complain on appeal of actions he consented to in the trial court. *Cf. State v. Gilbert,* 100 N.M. 392, 671 P.2d 640 (1983). Finally, a juror who was alleged to be sleeping during portions of testimony was not proved to be sleeping. The juror admitted she had her eyes closed and was nodding, but denied she slept during the trial. The conflict between what appeared and the juror's testimony was for the trial court to resolve. *See State v. Case,* 100 N.M. 714, 676 P.2d 241 (1984). There was no abuse of discretion in either this or any of defendant's jury issues.

4. Fingerprint Evidence

Latent prints were found at the scene of each of the crimes charged in the indictment. Officer Gallegos was qualified as an expert in fingerprint analysis without objection from defendant. He testified that the workable latent prints found at the crime scenes were defendant's prints. On cross-examination, he explained generally, but not specifically, how he compared the latent prints against defendant's known set of prints. He explained that he looked for patterns and characteristics and then, once characteristics were the same, he compared the number of ridges between the characteristics. There were no unexplainable discrepancies, and the officer did not feel that it

was useful to speak in terms of a certain number of points of comparison. As far as he was concerned, a positive comparison was a matter of the examiner's judgment as to when he feels comfortable with his opinion.

Defendant expended a great deal of time and energy cross-examining all of the officers who lifted and examined the latent prints. The thrust of this examination was to show that the police could have, but did not, photograph the latent prints to show that they were, in fact, on the objects from which the officers claimed to have lifted them. The police had a set of defendant's fingerprints, which did not include palm prints, from several years before these incidents when defendant was arrested for a similar crime. The officers admitted that it was possible to tamper with prints but, contrary to defendant's assertion, they did not say it was possible to transfer prints from one card to another.

In closing argument, defendant argued to the jury that it was possible in this case for the police to have tampered with the print evidence so that the latents allegedly found at the crime scenes were, in fact, taken from defendant's prior known set of prints. He argued that this possibility would have been excluded had the police photographed the latent prints as they were found on the various objects. The officers had testified, however, that the purpose of print photography was not to exclude the possibility of tampering but was rather to preserve the latent print and exclude the possibility that it would be destroyed in the attempt to transfer it onto a card.

Based on these facts, defendant raises two issues on appeal. First, he contends that the court should have

stricken the testimony of the fingerprint expert because the expert was unable to satisfactorily explain how he arrived at his opinion. *See Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (Ct.App. 1972). Second, he contends that the state deprived him of due process by not preserving, by photography or otherwise, the evidence upon which the latent prints were allegedly found. *See State v. Lovato*, 94 N.M. 780, 617 P.2d 169 (Ct.App.1980).

Defendant's brief does not inform this court how the second issue was preserved for appellate review. *See State v. Martin*, 90 N.M. 524, 565 P.2d 1041 (Ct.App.1977), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977). Issues not preserved for review in the trial court need not be considered on appeal. NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 308 (Repl.Pamp.1983). For these reasons, we consider defendant's due process issue no further. On the merits, however, *see State v. Chouinard*, 96 N.M. 658, 634 P.2d 680 (1981), *cert. denied*, 456 U.S. 930 (1982); *State v. Duran*, 96 N.M. 364, 630 P.2d 763 (1981).

With regard to the first issue, defendant's complaint is that:

> Mainly, the witness testified that there was no generally accepted scientific requirement that a print examiner find, and be able to explain, any particular number of points of similarity or comparison. As trial counsel indicated at the motion hearing, this testimony flies in the face of scientifically established fingerprint techniques relied upon by most examiners, including the Federal Bureau of Investigation in its training of other CC [sic] examiners.

There are several problems with defendant's argument. First, Gallegos was the only fingerprint expert that

testified at trial, and despite defendant's complaint about his testimony, his testimony stands uncontradicted that there are no particular number of points of comparison necessary to a valid opinion. Arguments of counsel are not evidence. *See State v. McGill,* 89 N.M. 631, 556 P.2d 39 (Ct.App.1976). Second, for purposes of the hearing on defendant's motion to strike the fingerprint examiner's testimony, defendant relied on a book appearing to require twelve points of comparison. The book is not before this court as part of the record on appeal. It is defendant's burden to bring up the necessary record on appeal, and failing that, there is nothing for this court on review. *State v. Duran,* 91 N.M. 756, 581 P.2d 19 (1978).

Third, within the context of his testimony, the witness satisfactorily explained how he arrived at his opinion. He spoke about pattern, characteristics, ridges and the absence of unexplainable discrepancies. On cross-examination, defendant never sought to shake the expert from his opinion and did not point to a single comparison in which there was any discrepancy whatsoever. Under NMSA 1978, Evid. Rule 705 (Repl.Pamp.1983), the expert may testify to his opinion and may be required to disclose the underlying facts on cross-examination. In this case, defendant never pressed him on the underlying facts on cross-examination. Accordingly, there was no error in the refusal to strike his testimony.

5. Line-up

We have considered defendant's claim that the line-up identification was unnecessarily suggestive and we have found it to be without merit.

6. Sufficiency of Evidence

Defendant asserts that the convictions for the crimes relating to victim four are not supported by substantial evidence. We disagree. While there was neither an identification nor fingerprint evidence for victim four, the state relied on serology evidence and one the fact that the crimes against victim four fit the same pattern or modus operandi as defendant's pattern in the other crimes for which he was convicted. Evidence of other crimes has a strong probative value when there is sufficient evidence of similar characteristics of conduct in each crime to show the perpetrator of the other crime and the perpetrator of the crime for which defendant has been charged is one and the same person. *Mayes v. State,* 591 P.2d 250 (Nev.1979). Here, there is evidence of sufficient similarity between the crimes against victims two, three and five to give logical force to an inference that the one who committed these crimes also committed the crimes against victim four.

Victim four falls into a grouping of four incidents that involved young girls between the ages of nine and eleven who were targets of sexual assault, committed by a stranger who entered their homes without consent, at night, after the household was asleep. All of the attacks occurred in the same small geographical area of town and two of the victims, including victim four, lived on the same street. Moreover, these attacks occurred within close temporal proximity, since they occurred in approximate two-week intervals. The evidence supports an inference that someone identified these children in advance and entered the houses looking for a specific victim. This is a distinctive pattern from which the jury could infer that the person

who committed the offenses as to victim four was the same one whose fingerprints were found and who was identified by the victims in two of the other incidents.

The state also presented serology evidence. Victim four is blood type A, PGM 1 and is a secreter. Defendant is blood type B, PGM 1 and also is a secreter. Evidence of B acid phosphatase was found on the clothing of victim four. On the basis of the evidence presented, the jury could logically infer that defendant was indeed the perpetrator of the crimes against victim four. Evidence must be viewed in the light most favorable to the jury's verdict, and all reasonable inferences must be allowed in support thereof. *State v. Tovar,* 98 N.M. 655, 651 P.2d 1299 (1982). Viewing the record as a whole, we conclude there was substantial evidence introduced to allow the jury to find defendant guilty of the crimes relating to victim four.

7. Sentence

Since we affirm defendant's convictions on all counts, defendant's issue regarding the unspecified suspension of part of his sentence is moot.

We have considered defendant's other arguments under this and other issues and find them to be without merit.

The convictions and sentences are affirmed.

IT IS SO ORDERED.

/s/Lorenzo F. Garcia, Judge

WE CONCUR:

/s/ Pamela B. Minzner, Judge

/s/ Harvey Fruman, Judge